No. 10415

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES T. TAKAHASHI AND EDWARD Y. OSAWA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The appellants herein were, as stated by appellants, indicted and convicted for violation (1) of Section 88, Title 18, U.S.C.A., and (2) of Section 6 of the Executive Order approved by the President March 15, 1941, effective April 15, 1941, promulgated pursuant

to Section 99, Title 50, U.S.C.A., and (3) of Section 80, Title 18, U.S.C.A.

Section 6 of the Executive Order provides:

> "The country designated on the application for license as the country of destination shall in each case be the country of ultimate destination. If the goods to be exported are consigned to one country with the knowledge that they are intended for trans-shipment thence to another country, the latter country shall be named as the country of destination."

The indictment charged the appellants herein, together with M. Ikuta, Koh Kohno, alias Willie Chang and M. H. Kiang, with (1) entering into a conspiracy to violate the foregoing regulation, (2) with the violation thereof and (3) with making false, fraudulent representations in respect thereto.

STATEMENT OF THE CASE

I.

The defendants in the above entitled cause and their respective business associations during the period referred to in the indictment are as follows:

1 Charles T. Takahashi, American-born Japanese owner of C. T. Takahashi & Co. of Seattle, Washington.

2 Edward Y. Osawa, General Manager of C. T.

Takahashi & Co., Seattle, Washington.

3 M. Ikuta, Director of the Mikuni-Shoko Company of Tokyo, Japan.

4 K. Kohno, alias Willie Chang, a representative of the Mikuni-Shoko Company of Tokyo, Japan.

5 M. H. Kiang, a representative of the so-called Hua Hsin Company of Shanghai.

Persons not indicted, but who appear in the proceedings, are Leo Nye Sing, otherwise known as Willie Leo, a Chinese merchant of Seattle, and William Shenker, salesman for Takahashi.

Takahashi, as stated in appellants' brief, for a number of years had been engaged in the exporting business, under the firm name of C. T. Takahashi & Co. Osawa for the past eleven years was his General Manager. The main office was in Seattle, Washington. Prior to 1938, Takahashi's export business was divided about fifty-fifty between China and Japan. For the Chinese business he used the name of "China Import & Export Company." Since 1938, however, he has done practically no business in China.

In 1940, acting through Mikuni-Shoko Company, he purchased for the Japanese Government fifteen second-hand storage tanks, five of which were for the

Japanese army and ten of which were for the Japanese navy (R. 365).

In November, 1940, he requested Mikuni-Shoko Company to secure for him orders from the Japanese Government for *new* tanks (R. 366-368). In his letter to Mikuni-Shoko Company, he stated that the new tanks, if ordered, would be purchased from the Graver Tank Company or the Sonken Galamba Supply Company; that the tanks would be delivered from Chicago to Seattle or Portland, "from which port we intend to ship out to Japan quietly" (R. 369).

On November 24, 1940, in confirmation of a telephonic order, Takahashi acknowledged to Mikuni-Shoko Company receipt for an order for eleven new tanks. The closing paragraph of the letter reads as follows:

> "Therefore, we are writing this letter with a view that you will prepare yourself for getting further new tank business from the Kaigun or from the Rikugun, for shipment during March or April" *(R. 371).

Kaigun means Japanese Navy, Rikugun means Japanese Army, Gunbu means Japanese military authorities.

At the time of the order, Takahashi had $71,700 cash credit, belonging to Mikuni-Shoko Company, to

apply on the tanks. He purchased three tanks from the Sonken Galamba Supply Company (R. 150), but was unable to obtain the other eight.

Upon completion of the three new 80,000 tanks, an embargo had been placed upon shipments to Japan, save by permit from the State Department. The Regulation provided specifically that, in the application for the permit, the name of the consignee and the actual country of ultimate destination should be inserted.

Accordingly, Takahashi sent Osawa to Washington, D. C. to obtain the necessary permit. An application was regularly made, the name of the purchaser not being inserted, however, as the Japanese Government, but as the Mikuni-Shoko Company, and the place of ultimate destination was properly named as Tokyo, Japan. This application was rejected by the State Department, as contrary to national defense.

Immediately following the rejection of the application, Osawa was sent by Takahashi to Japan. Takahashi's mother at the time resided in Japan and was a friend of M. Ikuta, one of the Directors of the Mikuni-Shoko Company. While in Tokyo, Osawa was in constant communication with F. Kohno and M. Ikuta. Kohno in 1940 had spent four months in Seattle, practically every day being in Takahashi's office.

When in Japan, Osawa was hounded by the Japanese authorities for delivery of the three tanks in question (R. 220). He telephoned Takahashi (R. 217), and wrote him that "We sure are on a spot on the three tanks." (R. 306)

Accordingly, an attempt was made by Osawa, Takahashi, Kohno and Ikuta to ship the tanks through to Japan.

First, Shenker was sent to Mexico. While he had other reasons for being in that country, one of the purposes was to arrange to export goods from this country to Mexico and from there to Japan (R. 219). Osawa and Takahashi decided, however, that this project was not feasible.

Another plan was to ship them to Vladivostok, but this likewise was determined to be impracticable.

Accordingly, Kohno went to Shanghai, and under the name of Willie Chang opened up an office in that city, as agent of the China Import & Export Company. Ikuta, for the purpose of carrying out the conspiracy, also made a trip to Shanghai (R. 303). Ikuta made arrangements in Shanghai for orders from Takahashi to be directed to either the Hua Hsin Company or the Tonway Trading Company (R. 309). He phoned this to Takahashi, after conferring with Osawa, stating

that Kohno, whose name in Shanghai, was Willie Chang, was to be the representative of Takahashi in that city.

Ex. 10 On June 27, 1941, Mikuni-Shoko wired, "Do utmost to arrange earliest possible shipment by every possible means oil tanks." (R. 294, 295)

Ex. 11 On June 28, 1941, Ikuta cabled, "Decided today name of firm (is) Hua Hsin Company, 320 Szechuen Road, Shanghai, China."

Ex. 13 On July 8, 1941, Mikuni-Shoko wired, "You will receive telegram from Hua Hsin Company."

Ex. 17 On July 16, 1941, Mikuni-Shoko, through M. Ikuta, wrote Takahashi,

> "As informed you previously by phone and telegrams, our Mr. Kohno has been working very hard every day in Shanghai under the present difficult conditions as stated in our last respects No. 28 and as known well by your Mr. Osawa, and at last we have decided as follows:
>
> 1 Hua Hsin Company, 320 Szechuen Road, Shanghai. * * *
>
> This firm has been recommended by the Military people here (Tokyo) * * *
>
> You therefore, intending to export to them the

following goods, can now apply for the export license. * * * 3 new tanks, 80's, and its necessary accessories, which we ordered from you last year * * * We trust, by this, we can prevent *our business from being detected* by anybody else and can get the delivery of 3 tanks safely." (R. 307, 308) (Italics ours)

In accordance with the arrangements made by phone, a cable was received by Takahashi from the Hua Hsin Company, and attached to the application, and sent to the State Department at Washington, D. C.

Takahashi had done no business with the Hua Hsin Company, had never written to that company, had never phoned them, had no credit whatsoever with the company, knew nothing about them, save and except through the Mikuni-Shoko Company and Ikuta. He had $71,700 credit from the Mikuni-Shoko Company and none from the Hua Hsin Company, yet the Hua Hsin Company told him to apply the $71,700 credit to the payment of the tanks. and T. thought this peculiar, replied.

Upon receipt of the telegram, Takahashi called in one Leo Nye Sing, a Chinese friend of his living in Seattle. An application was made for a permit directed to the State Department, the name of the consignor being the China Import & Export Company.

this is the application complained of is dated July 16, in found

This was signed by Leo Nye Sing, as the owner of that company. The application was sworn to by Leo Nye Sing. The name of the consignee named therein was the Hua Hsin Company. The place of ultimate destination named therein as Shanghai. Leo Nye Sing recognized his signature to the application, but had never heard of the Hua Hsin Company; never knew that an application was signed by him for these three new eighty thousand storage tanks. Takahashi admitted that the application was drawn up by him in his office, and that he had called in Leo Nye Sing, and had Leo Nye Sing sign the same, and that the place of ultimate destination named therein was inserted by him as Shanghai, China, and not Tokyo, Japan, and the name of the consignee as the Hua Hsin Company, and not the Japanese Government. This application was finally rejected by the State Department.

II.

The statement of facts necessarily includes the exhibits concerning which a petition to suppress was filed, and denied by the Court.

Osawa went to Tokyo, Japan, in March, 1941, directly after the petition to ship the three new 80,000-barrel storage tanks had been rejected. He wrote to Takahashi every day, phoned him regularly and was

at all times in communication with Mikuni-Shoko Company and the Military Authorities of Japan (Gunbu being the Japanese term).

He returned to Seattle on November 2, 1941. During the entire six months in Japan, he was endeavoring to curry favor with the Japanese Military Authorities, in order to secure some of their export and import business. The stumbling block was the failure of Takahashi to deliver to the Japanese Government the three 80,000-barrel, steel storage tanks. Accordingly, arrangements were made between Ikuta, Kohno, Osawa and Takahashi, for the delivery of these three tanks to the Japanese Government at Tokyo.

The conspiracy to so do, was discovered by the Customs Agents in Seattle on November 2, 1941, and the next few days, by an examination of the baggage of Osawa, the contents of a brief case of Takahashi and certain papers in Takahashi's office.

For a number of months, the Customs officials had Takahashi under observation for a violation of the Federal Funds Control Act. Takahashi, as a prominent exporter to Japan, had a permit to go upon an incoming vessel, but was specifically forbidden from entering the Customs enclosure. The Customs enclosure is a space set aside for the examination of bag-

gage. After the boat from Japan docked, Takahashi went aboard. In the meantime, a letter had been discovered in Osawa's stateroom, suggesting that he try to get six pairs of silk stockings past the Customs officials.

The Customs Agents, Atherton and Richards, observed Takahashi within the Customs enclosure — where he was specifically forbidden to be — with a brief case — conversing with Osawa. They saw Osawa and Takahashi passing papers back and forth.

Accordingly, they searched the brief-case of Osawa, separate from Takahashi, and found therein plaintiff's Exhibit No. 9, being a letter addressed to China Import & Export Company, said letter reading as follows:

"(Foreign Characters)
(Pencil Notations E-Y.O.B.C. 11/2/41 A.D. R.

Hua Hsin Company
Telephone: 15914 320 Szechuen Road

Shanghai, July 4th, 1941.

Messrs. China Import & Export Company
212 5th Ave. So.,
Seattle, Washington,
U.S.A.

Gentlemen:

As a consequence of our long business discus-

sion with your representative, Mr. W. L. Chang, we wish to open our most cordial business relation with your goodselves by our placing an order with you for three new storage tanks, which we have heard that you have in your hands as available stock, and we beg to confirm our today's telegraphic order as follows, which we trust, would have been receiving your most careful attention at your end.

Article: New storage Tanks, capacity 80,000 Bbls. ea. Specifications and Blue-Prints as handed by Mr. Chiang.

Quantity: 3 (three) complete sets with complete accessories and construction materials, such as welding rods and flux.

Price: CIF Shanghai U. S. $29,500 — per complete set.

Amount: U. S. $88,500.—

Payment: Deduct U.S. $71,700 from our credit account. Balance shall be remitted shortly. All particulars as per Mr. Chang's letter.

Packing: Usual Export Custom.

Shipment: From Pacific Coast July/August 1941.

Destination: Shanghai, China.

For your information we might as well add here that these tanks are to be imported for the local storage purpose and will not be re-exported to any country with whom you are not on friendly terms.

Thanking you in anticipation for your kind

attention to the above, we beg to remain, Gentlemen,

Yours faithfully,

HUA HSIN COMPANY.
M. H. KIANG,
Manager.

(Endorsed): Filed May 15, 1942.
(Pencil Notation): 10-6-42." (R. 292, 293)

Inasmuch as China Import & Export Company was Takahashi, and the letter itself disclosed $71,700 of foreign funds in the possession of Takahashi, and Osawa and Takahashi had been exchanging papers, the Customs officials examined Takahashi's brief-case also. In that brief-case were found the Exhibits complained of by appellants — to-wit:

1. A telegram in code transmitted by Mikuni-Shoko Company on or about June 27, 1941, at Tokyo, Japan, addressed to Takahashi & Co., Seattle, Wash., U.S.A., plaintiff's Exhibit No. 10, the pertinent part, as translated, being,

> "Do utmost to arrange earliest possible shipment by every possible means Oil Tanks and Tubes. Our customer desires additional offers Oil Tanks telegraph prospect." (R. 294, 295)

2. Letter dated July 5, 1941, addressed by Edward Osawa at Tokyo, Japan, to C. T. Takahashi, plaintiff's Exhibit No. 14.

" * * Getting down to serious business, I just received your letter No. 20. Was quite interested in the activity in Mexico and you can rest assured that I will do all possible to put it over over here. Have already discussed the situation with Ikuta and upon receipt that you can ship the machinery out, will go into real action. Have explained to him regarding payment and I think they understand. Too bad that everytime we use Shenker, it proves expensive. * * *

Shanghai office: The reason I was unable to send you the name of the Shanghai office is that it was not until shortly that Ikuta came to terms with the people over there. Seems they wanted too much *commission*. In order to make it easier for you in *making application* you can now say your representative is Willie Chang who is Schnicklefritz. The firm of Chang you better not use. Hereafter you better use the two firms, namely Hua Hsin Co. 320 Szechuen Road, Shanghai and Tonway Trading Co. * * * These two firms are the ones that Mikuni has made definite connection with in Shanghai. * * * " (R. 298-300) (Italics ours)

3. Exhibit No. 11 — Confirmation of telegram from Mikuni-Shoko Co. to Takahashi, pertinent parts reading:

"Decided today name of firm is Hua Hsin Company, address 320 Szechuen Road Shanghai. Confirm by telegram in order to prevent any misunderstanding." (R. 295, 296)

4. Letter from Osawa to Takahashi, dated July 12, 1941, plaintiff's Exhibit No. 15, pertinent parts being:

"Its been a long time since Kohno and finally Ikuta went to Shanghai and was finally able to make arrangements. They have a very good set up and have a *sort of an office there.* In order to make work progress better it is better that we have our own name registered there toounder Cieco so Ikuta is including our name in the office too and Kohno will be our representative there. * * *

Vladivostok and Netherland East Indies is absolutely out. Even if you get permit and ship there, it is no good because you cannot *tranship from there.* The Government will seize it for their own use and as the gunbo has no control there, they cannot do anything." (R. 303)

5. Letter from M. Ikuta, Director, Mikuni-Shoko Co. Ltd., to C. T. Takahashi & Co., plaintiff's Exhibit No. 17, the pertinent parts being as follows:

"Re: Shanghai:

As informed you previously by phone and telegrams, our Mr. Kohno has been working very hard every day in Shanghai under the present difficult conditions as stated in our last respects No. 28 and as known well by your Mr. Osawa, and at last we have decided as follows:

1) HUA HSIN COMPANY, 320 Szechuen Road Shanghai, Cable Add. HUACO. Phone: 15914.

This firm has been recommended by the Military people there, being their financial standing considered as very good, and after having made various discussions and talkings about this firm at Shanghai, this company has been considered as most suitable for our purpose, which they

agreed to co-operate with you and us. Good arrangement and better understanding have been secured. You therefore, intending to export to them the following goods, can now apply for the export license which we hope, you will surely succeed in securing from your government.

3. New Tanks 80s and its necessary accessories, which we ordered from you last year.

* * *

With reference to the advance money paid by us to you already, it would become necessary to prepare some evidence that all the payment against the 3 new tanks have been made to you by HUA HSIN CO. in place of our firm, which please take note. We trust, by thus, *we can prevent our business from being detected by anybody else* and *can get the delivery of the 3 tanks safely.*

* * *

Hoping to hear from you a good news at the soonest possible time and also hoping anything trouble will not be occurred in our tactics, we are, (Italics ours)

Yours faithfully,

FOR MIKUNI-SHOKO CO. LTD.
M. IKUTA
Director"

(R. 307, 308, 310)

6. Exhibit No. 12 was a telegram in code from Mikuni-Shoko Co. to Takahashi. Translated it read:

"With reference to trucks, mining machinery you may receive telegram from Tonway Trading Company 129 Hamilton House 170 Kiangse Road Shanghai instead of Chang stop Chang Willie is Kohno representative of your China Import &

Export Co." (R. 296, 297)

7. Exhibit No. 16 was a letter from Osawa to Takahashi, the pertinent parts being as follows:

> "When you talk to Gunbu it is quite different from when you talk to ordinary business houses. * * * Of course, they will overlook if we cannot ship because of definite embargo like our tanks but even on tanks they are hounding us every day. We sure are on a spot on the three tanks. I doubt if a day goes by that they don't call us or say something about them. If we could only get those three tanks out, it would be a life saver and they would do almost anything for us." (R. 306).

8. Exhibit No. 18, referred to, is a letter from Mikuni-Shoko Co. to Takahashi, the pertinent parts being as follows:

> " * * * 3 New Tanks: Should we fail in securing other various goods due to the reasons beyond our control, yet we are hoping to secure this item, first of all, because we shall have nothing to reward for our Gunbu's patronage. The Gunbu people are enthusiastically desiring to get the delivery of this item and are encouraging us at all times. They are trusting us for our abilities as well as your own." (R. 311, 312)

Appellants in their petition filed on April 27, 1942, almost six months after the search, state that the Customs officials arrested and detained Osawa and Takahashi, and took from them certain papers, money, etc., and afterwards took possession of their

offices; that a demand was made for the return of said papers, but the same was refused.

No demand was made for the return of the papers until April 27, 1942. Neither Osawa or Takahashi were detained by the Customs officers. At the request of the officers, Takahashi and Osawa came to the office the next day. A meeting was arranged for the following morning, Takahashi's attorney being present. Every day during the following week, Atherton, Richards, Takahashi and Masuda, Takahashi's attorney, conferred. Masuda appeared in Court as a witness for the appellants. His testimony was as follows:

"Mr. Takahashi called on me sometime about the 3rd of November, 1941, in connection with some request that had been made upon him by the Customs Department, or agents of the Customs Department of the United States. * * * He asked for advice about certain papers the agents wanted. He was willing to deliver the papers and I advised him to do so, and co-operate fully with the Government, and assist them in their investigation. As far as I know, he made available to the agents everything that they wanted in the way of papers and documents." (R. 238, 239)

And Mr. Atherton testified: "We talked with

defendant Takahashi and with Mr. Masuda, his counsel, at his place of business, practically every day. * * * During the month of November, we obtained other papers from him. I borrowed papers at frequent intervals. I would borrow some papers and he would give them to me, and I would take them to the office, examine them and bring them back, and he would give me some more. That occurred two or three times. Of some of the papers that I thought important, I had a photostat copy made." (R. 165)

So we find that, not only was there no request for the return of the papers in question, prior to the return of the indictment, but in fact a consent on the part of Takahashi, concurred in by his attorney, that the Government have not only the papers in question, but any other papers in his possession.

Takahashi in his interview admitted that the tanks described in the second application were the same as the ones described in the first — that he had no $71,700 credit with Hua Hsin Co. He denied that the Hua Hsin Company was connected in any way with the Mikuni-Shoko Company.

At the close of the case, appellants made a motion for dismissal, which was denied. The jury returned a verdict, motions for a new trial were made

and denied. The defendants were sentenced, and this cause is now here for review.

ARGUMENT AND AUTHORITIES

Counsel for appellants in their brief admit that Kohno and Ikuta conspired to get their three 80,000 storage tanks to Japan, by means of a false application, but denied that appellants had any part in the conspiracy.

One who comes into a conspiracy after it has been formed with knowledge of its existence, and with the purpose of forwarding its designs, is equally as guilty as if he had participated in its original formation.

Nyquist v. United States, 2 Fed. (2d) 504;
Hagen v. United States, 268 Fed 344;
United States v. Olmstead, 5 Fed. (2d) 712.

Only one overt act is necessary.

Jung Quey v. United States, 222 Fed. 766.

In this case all were proven.

That the conspiracy was not successful is no defense.

Kramer v. United States, 245 U.S. 478, 62 Law E. 413.

Place of the conspiracy is immaterial, provided overt act is committed within jurisdiction. Conspir-

acy may be tried in any district where overt act is committed.

Diehl v. United States, 98 Fed. (2d) 545;
Smith v. United States, 92 Fed. (2d) 460;
Rivera v. United States, 57 Fed. (2d) 816;
Sell v. Rustad, 22 Fed. (2d) 968.

In the present case, we have the appellants phoning one another, sending telegrams, writing. We have three tanks purchased for the Japanese Government—delivery Tokyo — an application rejected. Osawa going to Tokyo — never going near Shanghai — never heard of the Hua Hsin Company — save and except through the military authorities of Japan — a scheme to get their tanks to Tokyo — by Mexico, by Valdivostok — the name of Hua Hsin suggested by Ikuta — Osawa hounded day by day by the military authorities of Japan in Tokyo — an application signed by Leo Nye Sing, who never knew that it contained 3 storage tanks, who had no connection with China Import & Export Company — $71,700 advanced by Mikuni-Shoko Company at Tokyo — none by Hua Hsin Company — the boat going to Yokohama before it goes to Shanghai. On the merits, the jury could bring in but one verdict — there certainly was evidence for the jury to determine the place of ultimate destination, to-wit, Japan and not China.

The Petition for the Return of the Documents taken at the Dock.

As to Appellant Osawa:

Takahashi's brief-case was examined by the agents when Osawa was not present.

All the documents referred to except Exhibit No. 9 were in the possession of Takahashi. Osawa neither had possession, nor ownership of the papers.

Inasmuch as the papers in question neither belonged to him, nor were taken from his possession, appellant Osawa could not object to their admissibility.

A Guckenheimer v. United States, 3 Fed. (2d) 786;
Ingram v. United States, 113 Fed (2d) 966;
Lewis v. United States, 92 Fed. (2d) 952;
Whitcombe v. United States, 90 Fed. (2d) 290.

The only exhibits involved in this appeal taken from Osawa was Exhibit No. 9. This exhibit did not belong to him. It was a letter addressed to China Import & Export Company (Takahashi). He had it for the purpose of showing it to Takahashi.

Not belonging to Osawa, he cannot complain as to its admissibility.

In *Kelley v. United States*, 61 Fed. (2d) 843, the Court said:

> "The most that can be claimed here is that Kelley as an employee had a certain physical custody and control of the illegal business and of the

incriminatory evidence. That is not sufficient."

And in the case of *United States v. Hoyt*, 53 Fed. (2d) 882-884:

> "As to the corporate papers * * * an additional reason for denial of this motion is found in the principle laid down in the cases of *Essegee v. United States*, 262 U. S. 151 (and other cases), wherein it was held unequivocally that an officer of a corporation is not given any right to object to the production of papers because they may disclose his guilt, even though they are in his custody."

That the Customs Agents had the right to search Osawa is, of course, not questioned.

In the case of *Landau v. United States*, 82 Fed. (2d) 285, certiorari denied 56 S.Ct. 747, the Court held that a person entering the country from a foreign land could be searched. The authority is given by 19 U.S.C.A. 482, and the Regulations of the Secretary of the Treasury promulgated thereunder.

Takahashi having boarded the vessel, and having gone from the vessel to the Customs enclosure — a place where he was forbidden to enter — and having been seen passing papers back and forth with an incoming passenger, placed himself in the same position as an incoming passenger of the boat. The Regulation that a passenger's effect could be searched, would be futile, if a person who had gone upon the

boat, exchanged papers with a passenger, and then gone into the enclosure where all the baggage of the passengers was taken, would be exempt.

Counsel for appellants do not deny the right of the Customs officials to make the search.

And the search disclosed — not only evidence of the conspiracy, but the very instruments by which the conspiracy was carried on — namely the documents to be used in carrying out the conspiracy — the need for the conspiracy — and the manner of its execution.

In the Landau case (supra) the Court held that the memorandum, consisting of an exact tabulation of the smuggled merchandise, constituted an instrumentality of the crime.

In the case of *Marron v. United States*, 275 U. S. 192, the Supreme Court held that it was not unreasonable to find that ledgers and bills were used to carry on the business of maintaining a nuisance, and they could be seized on a search of the premises incidental to a lawful arrest.

In *Foley v. United States*, 64 Fed. (2d) 1-4, referring to books of unfilled orders, the Court said:

> "The things seized were not mere evidence. They were things actually used in committing the

crime of conspiracy charged, and considering the extent of the business done were even necessary to its execution."

In *United States v. Hart*, 214 Fed. 655, the Court said:

> "Burglar's tools, used by the owner to commit a crime may be kept from his possession when found on his person or on the premises or elsewhere, and as it is a crime to enter into a conspiracy with others to defraud * * * it seems to me that the writings of the defendant, used by them to form the conspiracy and in committing overt acts, and showing its formation or existence and attempted execution, should be treated as tools used in the perpetration or attempted perpetration of crime, and held to be used in evidence."

See also, *United States v. Poller*, 43 Fed. (2d) 911;
United States v. Hoyt, 53 Fed. (2d) 882.

The real evil aimed at by the 4th Amendment is the search itself, that invasion of a man's privacy which consists in rummaging among his effects to secure evidence. Its purpose was not for the protection of a criminal, who having been legally searched, was found to possess the very instrumentalities by which this crime or any other crime had been committed.

Takahashi, having been legally searched, having

voluntarily offered to the Customs Agents all his papers for examination, and the exhibits introduced being the very instrumentalities by which the conspiracy was being executed, the Court's action in refusing to suppress, and allowing the exhibits to be introduced in evidence, was in accord with the laws of the United States.

COMMENT ON THE EVIDENCE

ASSIGNMENT OF ERROR No. VIII.

The Court properly instructed the jury as to their duties. He frankly told them that as to the facts, they were the sole judges.

> "No opinion that the court may have nor that you may think the court may have as to the guilt or innocence of the defendants or the credibility to be accorded the testimony of any witnesses or as to the inferences to be drawn from any circumstances proven is controlling or binding upon you. It is for you to determine the facts in this case." (R. 267)

> "I am not going to tell you what my verdict would be if I were on this jury. That is your responsibility. But if I did tell you, or what I may say as to the evidence does not bind or control you at all. It would be your privilege to differ absolutely from me or to agree with me if you independently so decided." (R. 270)

And after the objection raised by counsel, the Court emphasized this very point by saying:

> "With respect to certain comment I made on certain evidence, I wish to remind you again that you are not bound or controlled by any comment at all I make on the facts. You have the right absolutely and entirely to disregard whatever I say." (R. 283)

Now then, coming to the question of the fairness or unfairness of the comments—

> "The jury may be advised that the Court sees nothing against the defendants or either of them in the fact that Mr. Osawa used some other method than a passport to go to Japan. It was perfectly legal and indicates in no wise any guilty knowledge or any guilty purpose." (R. 276)

Certainly the Court was fair to the defendents in *that* comment.

And again:

> "But with respect to Exhibit 20 the Court wishes the jury to understand that there is no inference to be drawn against the defendants or either of them upon the ground that bearings were improper to be sent to Mukden." (R. 283)

Certainly that comment was fair to the defendants.

In the case of *Pfaff v. United States*, 85 Fed. (2d) 309, the Court said, "You wouldn't need many customers like that", and "That is about the worst I ever heard." The Appellate Court in passing on this comment said:

"Judges presiding in Federal courts may comment upon the evidence and express opinions respecting the effect of such evidence, even of guilt or innocence of the accused. *Horning v. District of Columbia*, 254 U.S. 135, 65 L.Ed. 185; *Sparf v. United States*, 156 U.S. 51, 39 L.Ed. 343."

In *Woo v. United States*, 73 Fed. (2d) 897, on page 900, the comment of the Court complained of read as follows:

"How can Americans know the inside of Chinese, who cannot talk English and whom they do not talk to, but simply see them on sundry occasions?"

The Appellate Court in ruling on this comment said:

"It is proper for the trial judge to comment upon all facts and circumstances which might aid the jury in determining the guilt or innocence of the accused."

And in *Hargreaves v. United States*, 75 Fed. (2d) 68, the following comment came on for review:

"Take the Brown incident, for instance. There again upon the question of intent the inquiry arises in my mind: What was the necessity of borrowing that money from the Bank of America in the first place? Does it indicate that the defendant in this action did not want his own bank to know about it at the time? The money admittedly was for his use; why didn't he borrow the money from the bank and give his own note for it? If now, in illustrating the case given you a

> moment ago, if he could not have gotten that money out of his own bank, then the method used would be a misapplication of funds, even though the Brown note were fully secured." etc.

This didn't constitute reversible error.

In *Richards vs. United States*, 63 Fed. (2d) 338, the error complained of consisted in the following:

> "They say you should not count your chickens before they are hatched. I should say this is counting your chickens before you ever started in to raise hens."

Also, the following comment by the Judge concerning a book put out as advertising matter, with the knowledge of the defendants. The Judge characterized it as "learned nonsense," as "a thing very cleverly got up, as I say, to impress the ignorant." The Appellate Court said that while the criticism was sharp it was not unfair.

In the present case, there is no pretense that the trial Judge quoted any testimony incorrectly, or that he referred to any exhibit that was not duly admitted in evidence. Likewise, there is no pretense that he did not emphasize, again and again, that any comment made by him was not controlling in any way on the jury.

The true rule in regard to comments on the evidence and inferences from the evidence is set forth in

the recent case of *Scritchfield v. Kennedy*, 103 Fed. (2d) 467, as follows:

> "The trial judge is not limited to abstract instructions. It is within his province, whenever he reasonably thinks it to be necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of same which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted for their determination."

There is no pretense in this case that the trial Judge did not time and time again emphasize to the jury that they were solely the judges of the facts, and that any opinion that he might have, or they might think that he had, relative to the guilt or innocence of the defendants, or either of them, was not in any way binding or controlling upon them.

ASSIGNMENT No. IX

The Court, in his instructions to the jury, gave first of all the law in regard to the case and then made certain comments on the evidence as presented, and the inferences to be drawn from the evidence. It is the duty of counsel for litigants on both sides, to inform the Court, either prior to the instructions being given, or at the conclusion thereof, as to any particular

point on which he desires the jury instructed. There is no pretense by attorneys for the appellants that they made a request for a certain definite instruction on the probative value of reputation testimony. The Court could have utterly ignored the testimony relative to the reputation, and the evidence of good reputation, introduced in the trial of the case by the appellants. Instead, he gave the following instruction:

> "There has been evidence introduced in this case as to the good reputation, — that is, what people say as to the honesty or integrity of the defendants, — and you shall give such testimony that weight as you believe it entitled to receive in determining whether or not the defendants are guilty as charged." (R. 279)

Counsel for the appellants objected, not to the instruction as given, but to the Court's comment on the same, appellants' objections being as follows:

> "The Court went further and, by his instructions, wiped out all of the law of good reputation and honor, so far as the defendants are concerned, by his instruction that the jury could consider the reputation for what it is worth, but —as the jury knows, said the Court—people with good reputations are guilty and in this case so and so and so and so." (R. 281).

If the appellants desired an instruction in accordance with what they claimed to be the law, they could at that time have so informed the Court, instead of

making a statement, "so and so and so and so." In view of the nature of the objection, the Court if it so desired could have completely ignored the same and allowed an exception.

However, the Court went further, and instructed the jury, in substance, that if in the light of all of the testimony, and in the light of the reputation testimony, they believed the defendants, or either of them, were not guilty, they had the right to base their verdict upon their interpretation of the testimony, together with the reputation testimony. And again appellants had the opportunity, if they so desired, to give the Court the benefit of what they considered proper instruction. This they utterly failed to do, or to point out to the Court just what part of the instruction they objected to.

But to show the absurdity of the present claim of the appellants, that by this instruction the Court was placing the burden of proof upon the defendants to establish the fact that they were not guilty, we find immediately following the giving of this instruction, the Court saying:

> "But if not convinced by the evidence and the reasonable inferences of the evidence beyond all reasonable doubt of the guilt of the defendants, the jury cannot convict the defendants or either

of them upon suspicion, conjecture or surmise or prejudice."

The Court had heretofore repeatedly instructed the jury that the defandants were, at all times and throughout all stages of the case, presumed to be innocent until they were proven guilty beyond a reasonable doubt; that this presumption continued throughout the trial and until the jury finds that the presumption has been overcome by the evidence, beyond a reasonable doubt. (R. 251).

And again:

> "You are instructed that it is not the policy of the law that a verdict of guilty should be returned against anyone on trial for any crime unless such verdict is supported by the evidence beyond a reasonable doubt." (R. 250).

Counsel for appellants in their brief admit that the Court probably intended to instruct in accordance with counsel's interpretation of the law, but object to the wording of the instruction. To say that this was prejudicial error, in face of no request, and no informing of the Court wherein the instruction was improper, is, of course, absurd.

CONCLUSION

The defendants were duly and regularly indicted. They had the benefit of a fair and impartial trial by a jury duly qualified. The trial Court listened patiently and ruled impartially. No prejudicial error having been committed in the trial, the conviction of the appellants herein, and each of them, should be affirmed.

Respectfully submitted,

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